OCBC BANK (MALAYSIA) BERHAD

v.

HOTEL RASA SAYANG SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED JC
[ORIGINATING SUMMONS NO: 24-2447-1999 (4)]
18 FEBRUARY 2005

LAND LAW: *Charge - Order for sale - Application for - Demands for payments of the facilities - Whether recovery of both overdraft and revolving credit facilities precluded by proviso to s. 254(3) of the National Land Code 'NLC' - Differences found in Form 16D of the NLC and amended originating summons - Whether defendant prejudiced or misled - Claim for legal fees - Whether plaintiff entitled to an order for sale even though amended originating summons included legal fees and valuation fees - Whether appropriate statutory notices as stipulated in the NLC given by plaintiff - Whether plaintiff complied with all procedural requirements prescribed by O. 83 of Rules of the High Court 1980 - Whether defendant failed to establish any valid ground that would constitute cause to the contrary for purposes of s. 256(3) of the NLC*

LAND LAW: *Charge - Order for sale - Cause to the contrary - Whether established - National Land Code, s. 256(3)*

This was an application by the plaintiff in encl. 58A for an order for sale of a piece of land ('the charged property') to be sold by public auction pursuant to s. 256 of the National Land Code ('the NLC') and O. 83 of the Rules of the High Court 1980 ('the RHC'). The brief background of the facts were that by a letter dated 13 March 1996, the plaintiff had granted the defendant overdraft of RM6,000,000 and a revolving credit facility of RM9,000,000. Soon after, on 16 April 1996 the defendant executed a charge in Form 16A of the NLC over the charged property as security for the said banking facilities and subsequently a facility agreement was signed between the plaintiff and the defendant. The defendant defaulted in payment to the plaintiff, as a result of which the plaintiff issued the defendant a letter recalling the said banking facilities and demanding the payment of RM16,522,831.28 together with interest thereon, outstanding, as of 24 August 1999. When the defendant failed to respond, the plaintiff issued the defendant a statutory notice of default in Form 16D of the NLC demanding the outstanding amounts and required the defendant to remedy the said breach, failing which an order for sale would be applied. The defendant herein raised four issues in opposing the plaintiff's application

in encl. 58A: (1) based on a proper reading of the provision to s. 254(3) of the NLC the plaintiff could not treat as due and owing the amount secured under the charge as it covers not only an overdraft but also revolving credit and it was argued that payment of the sums in the revolving credit portion was paid periodically; (2) the plaintiff's Form 16D contained serious discrepancies in amounts, interest rates, calculations and sums which were not due when compared with the prayers in the amended originating summons (OS); (3) that plaintiff was guilty of unconscionable conduct in stringing the defendant along in giving the impression that it could obtain a deduction in interest rate and (4) that plaintiff was not entitled to an order for sale because the outstanding amounts in the amended OS included legal and valuation fees.

Held (allowing plaintiff's application in encl. 58A with costs):

[1] As set out in the letter of offer dated 13 March 1996, each of the disbursement made under the revolving credit facility shall be repaid on the respective maturity date unless rolled over by the plaintiff, in which case, interests accruing are to be serviced. The plaintiff had made the requisite demands for payments of the facilities. In consequence, the payments due under the revolving credit facilities were not periodic nor were they annuities. Both the overdraft and revolving facilities were recalled on 24 August 1999. For that reason, the entire sums granted under the facilities became immediately due and payable. The defendant had failed to show how the recovery of both the overdraft and revolving credit facilities were precluded by the proviso to s. 254(3) of the NLC. (p 166 g-h)

[2] The defendant had never raised the issue of the differences in Form 16D and the amended OS in any of its affidavits in reply. It appeared that the defendant only raised it for the first time herein, thus it was merely an afterthought and the defendant is estopped from raising it now. Following the decision of the Federal Court in *Syarikat Kewangan Melayu Bhd v. Malayan Banking Berhad* the defendant was not prejudiced or misled by the said differences for the following reasons (1) the defendant had refused to pay the outstanding sums owed to the plaintiff on the sole ground that it did not receive any reduction in the interest rate which was allegedly promised; (2) there was no evidence at all that the plaintiff had at any time tried to mislead or prejudice the defendant; (3) there was no evidence that the defendant had ever sought information from the plaintiff how much was due from the charge so as to enable the defendant to

make repayments. Even after the statutory demand of 4 October 1999 was issued, the defendant had ignored it and refused to rectify the breach. Further, the arguments of the defendant that the differences amounted to a cause to the contrary was on shaky ground in the light of the Federal Court decision of *Co-operative Central Bank Ltd (In receivership) v. Feyen Development Sdn Bhd.* (p 167 c-g)

[3] An order for sale is an *ad rem* remedy and that this proceeding before the court could not be the forum for raising any contractual disagreement allegedly existing between the plaintiff and the defendant. The court was unable to agree with the defendant's submission that the plaintiff was guilty of unconscionable conduct. Further, the issue raised by the defendant did not constitute a cause to the contrary for purposes of s. 256(4) of the NLC. (pp 168 b & 169 b)

[4] The plaintiff was correct in its submission that it was entitled to an order for sale even though the amended OS included legal fees and valuation fees. Clauses 10.2 and 10.20(3) of the charge in question expressly permitted the plaintiff to debit the defendant's account in respect of all monies due and payable under the charge including the plaintiff's solicitor's fees and any other fees and expenses incurred in recovering the said monies through any process of law. Clause 10.16 of the charge provided that the plaintiff shall as and when it deems fit be entitled to engage at the cost and expense of the defendant, a licensed valuer to carry out a valuation/revaluation of the charged property. Moreover, the defendant's argument that the plaintiff was not entitled to an order for sale for the reason that the outstanding amounts in the amended OS include legal and valuation fees, did not, in any event, constitute a cause to the contrary for purposes of s. 256(3) of the NLC. (pp 169 f-g & 170 f)

[5] The plaintiff had given all the appropriate statutory notices as stipulated in the NLC and complied with all the procedural requirements prescribed by O. 83 of the RHC. The defendant had failed to establish any valid ground that would constitute a cause to the contrary for purposes of s. 256(3) of the NLC. (p 171 a-b)

Case(s) referred to:
Bangkok Bank Bhd v. Chuan Kee Co Sdn Bhd [2000] 1 CLJ 766 HC ***(refd)***
Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 FC ***(refd)***
Kandiah Peter v. Public Bank [1993] 4 CLJ 332 SC ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1977] 1 MLJ 77 ***(refd)***
Syarikat Kewangan Melayu Bhd v. Malayan Banking Bhd [1984] 1 MLJ 115 ***(foll)***

Legislation referred to:
National Land Code, ss. 242(1), 254(3), 256(3), Form 16A, 16D
Rules of the High Court 1980, O. 83

For the plaintiff - Tan Gian Chung; M/s Shook Lin & Bok
For the defendant - Johanan A Puthucheary; M/s Nadzarin Kuok Puthucheary & Tan

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed JC:

This is an application by the plaintiff in encl. 58A for an order for sale of a piece of land known as Lot PTB No. 19190 HS (D) 227750 Bandar Johor Bahru Daerah Johor Bahru in the State of Johor (the charged property) to be sold by public auction pursuant to s. 256 of the National Land Code 1965 (the NLC) and O. 83 of the Rules of the High Court 1980 (the RHC). As stated by s. 256(3) of the NLC, on any such application, the court shall order the sale of the land to which the charge relates unless it is satisfied of the existence of cause to the contrary.

The brief background facts of the case are as follows. By a letter of offer dated 13 March 1996, the plaintiff granted the defendant overdraft of RM6,000,000 and a revolving credit facility of RM9,000,000. Soon after, on 16 April 1996 the defendant executed a charge in Form 16A of the NLC over the charged property as security for the said banking facilities. On 2 May 1996 a facility agreement was signed between the plaintiff and the defendant. Later on the defendant defaulted in payment to the plaintiff. As a result on 24 August 1999 the plaintiff's solicitor issued the defendant a letter recalling the said banking facilities and demanding the repayment of RM16,522,831.28 together with interest thereon, outstanding, as of 24 August 1999. The letter was sent to the defendant by way of AR Registered post and was acknowledged by the defendant. After that, on 4 October 1999 when there was no response the plaintiff's solicitors issued the defendant a statutory notice of default in Form 16D of the NLC demanding the outstanding amounts as at 31 August 1999. It is relevant to reproduce the notice, which was in the following terms:

NATIONAL LAND CODE

FORM 16D

NOTICE OF DEFAULT WITH RESPECT TO A CHARGE

To:

Hotel Rasa Sayang Sdn. Bhd.
10, Jalan Date' Dalam
80000 Johor Bahru

Chargor/s under the charges described in the schedule below of the land so described.

WHEREAS you have committed a breach of the provisions of this charge by having defaulted in the repayment of the following:

(a) **OVERDRAFT**

RM6,264,803.33 with further interest being charged at 8.80% per annum on monthly rest plus excess charges of 1% per annum above the applicable interest rate or such other rates as may be determined by the bank.

(b) **710-408076-8**

RM2,254,301.89 (principal of Revolving Credit of RM1,900,000.00 which was due on 29.1.1999; interest of RM354,301.89) with further interest charged at 16.50% per annum on monthly rest.

(c) **710-408078-4**

RM593,237.28 (principal of Revolving Credit of RM500,000.00 which was due on 29.1.1999; interest of RM93,237.28) with further interest charged at 16.50% per annum on monthly rest.

(d) **710-408085-7**

RM2,342,704.36 (principal of Revolving Credit of RM2,000,000.00 which was due on 5.5.1999; interest of RM342,704.36) with further interest charged at 16.50% per annum on monthly rest.

(e) **710-408088-1**

RM4,078,822.78 (principal of Revolving Credit of RM3,500,000.00 which was due on 10.5.1999; interest of RM578,822.78) with further interest charged at 15.70% per annum on monthly rest.

(f) **710-408101-2**

RM1,149,904.89 (principal of Revolving Credit of RM1,000,000.00 which was due on 27.5.1999; interest of RM149, 904.89) with further interest charged at 15.05% per annum on monthly rest.

Outstanding LG of RM80,000.00

And whereas the breach has continued for a period of at least thirty (30) days prior to the date of this notice.

We, OCBC bank (Malaysia) Berhad (295400-W) of No: 1, Jalan Ibrahim, 80000 Johor Bahru, as Chargees by virtue of the powers conferred by Section 254 of the National Land Code, hereby require you within the period of thirty (30) days from the service of this notice to remedy the breach.

AND TAKE NOTICE that, if you fail to remedy the breach within that period, we shall apply for an Order of Sale.

Dated this 4-10-1999

t.t.
...
Signature (or other form of Execution) by or on behalf of the Chargees.

Consequently, on 17 December 1999 the plaintiff filed its originating summons (the OS) against the defendant to recover the sums owing under the said banking facilities. Later, on 19 January 2001 the defendant filed its application (the stay and consolidation application) for an order that the OS proceedings be stayed pending the trial of the plaintiff's writ action in Civil Suit No. 22-677-1999 in the Johore Bahru High Court and that the OS proceedings be consolidated with the writ action and proceeded with as if begun by writ. The learned judge dismissed the stay and consolidation application with costs on 4 February 2002. Later on the defendant filed its notice of appeal to the Court of Appeal on 1 March 2002 against the decision of the learned judge. On 10 April 2002 the plaintiff filed a summons in chambers to amend the OS. Subsequently, on 23 April 2002 the defendant filed its application for an order that the OS proceedings be stayed pending the disposal of the defendant's appeal to the Court of Appeal against the learned judge's decision. The deputy registrar dismissed the application to amend the OS on 22 October 2002. Soon after, the plaintiff appealed to the judge in chambers against the deputy registrar's decision. On 17 September 2003 the learned judge allowed the plaintiff's appeal; the plaintiff's application to amend the OS was allowed. On 15 October 2003 the defendant filed its notice of appeal to the Court of Appeal against the learned judge's decision of 17 September 2003. After that on 7 September 2004 the Court of Appeal dismissed both of the defendant's appeals against the learned judge's decisions of 4 February 2002 and of 17 September 2003 with costs. The defendant's stay application was struck out with costs on 15 September 2004. The total outstanding amounts due under the charge as at 18 February 2005 are as follows:

(a) **Overdraft Facility (Account No. 710-112387-3)**

RM10,310,375.20 as at 18 February 2005 together with interest thereon at the rate of 2% per annum over the plaintiff's base lending rate on the authorized overdraft limit of RM6,000,000.00 and 3% per annum over the plaintiffs base lending rate on the excess over the authorized overdraft limit, with monthly rests, from 19 February 2005 to the date of full settlement;

(b) **Revolving Credit Facility (Account No. 710-408076-8)**

RM5,525,942,32 (including outstanding principal sum of RM1,900,000.00) with interest thereon at the rate of 16.50% per annum with monthly rests from 19 February 2005 to the date of full payment;

(c) **Revolving Credit Facility (Account No. 710-408078-4)**

RM1,454,194.92 (including outstanding principal sum of RM500,000.00) with interest thereon at the rate of 16.50% per annum with monthly rests from 19 February 2005 to the date of full payment;

(d) **Revolving Credit Facility (Account No. 710-40805-7)**

RM5,589,714.33 (including outstanding principal sum of RM2,000,000.00) with interest thereon at the rate of 16.00% per annum with monthly rests from 19 February 2005 to the date of full payment;

(e) **Revolving Credit Facility (Account No. 710-408088-1)**

RM9,575,718.44 (including outstanding principal sum of RM3,500,000.00) with interest thereon at the rate of 15.70% per annum with monthly rests from 19 February 2005 to the date of full payment;

(f) **Revolving Credit Facility (Account No. 710-408101-2)**

RM2,606, 445.45 (including outstanding principal sum of RM1,000,000.00) with interest thereon at the rate of 15.05% per annum with monthly rests from 19 February 2005 to the date of full payment.

Before me learned counsel for the defendant has raised 4 issues in opposing the plaintiff's application in encl. 58A. I shall deal with each of them in turn. Before turning to consider the arguments raised by learned counsel for the defendant, I would like to say something about s. 256 of the NLC. The first is that the procedure under s. 256 is meant to be speedy and summary in nature. This was explained by the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1977] 1 MLJ 77 where Gopal Sri Ram JCA at p. 88D said:

> A judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

The second is that the enforcement of a charge by a chargee is an assertion of a statutory right. The enforcement of a charge is not an action for a debt upon covenant but under the registered charge. In *Kandiah Peter v. Public Bank* [1993] 4 CLJ 332, Eusoff Chin SCJ in writing for the Supreme Court made this point very clear:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue.

The third and the last point is that s. 256(3) of the NLC is a mandatory provision. If no cause to the contrary is shown, the court is obliged to make an order for sale. Gopal Sri Ram JCA in *Low Lee Lian (supra)* cited and applied the following passage from the speech of Lord Oliver of Aylmerton in the Privy Council case of *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 at p 84 H-I:

> In *Keng Soon Finance Bhd v. MK Retnam Holdins Sdn. Bhd. & Anor* [1989] 1 MLJ 457 at p 460, the Privy Council while acknowledging the existence of the proposition, limited its operation in the following terms:
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> > Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

And, later still His Lordship said this at p 87 I-C:

> We are conscious that the approach we have adopted results in a very narrow and restrictive interpretation of s. 256(3) of the Code. But there are good reasons of policy for such an interpretation. It must not be forgotten that in the ordinary way, banks and other financial institutions loan moneys deposited with them by their customers to a borrower on the faith of the security of a charge created over the landed property of the borrower, or as here, of a third party. In the event of a default by the borrower, the lending institution normally looks to early recovery of all or a substantial part of the money due to them from a sale of the security. If the courts of this country interpret the phrase 'cause to the contrary' appearing in s. 256(3) of the Code liberally, then, institutional lenders would lose confidence in their right to realize their security through an order for sale. Financial institutions would then become reluctant to lend money to *bona fide* entrepreneurs. Commerce would come to a standstill and the development of land and industries in this country which are largely dependent upon loans from banks would cease. No judgment of this court will be designed to produce such a consequence,

Returning to the present case, I shall now deal with the specific issues raised by learned counsel for the defendant. First, it is his argument that based on a proper reading of the proviso to s. 254(3) of the NLC the plaintiff is not entitled to claim that the whole sum secured by the chargee has become due and payable. To put the matter in perspective, I think it is useful to reproduce the whole of s. 254 of the NLC, which reads as follows:

> (1) Where, in the case of any charge, any such breach of agreement as is mentioned in subsection (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the charge may serve on the chargor a notice in Form 16D:
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> (a) Specifying the breach in question;
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> (b) Requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and
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> (c) Warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.
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> (2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.
>
> (3) If at the expiry of the period specified in any such notice the breach in question has not been remedied:

(a) The whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and

(b) The chargee may apply for an order for sale in accordance with the following provisions of this Chapter:

Provided that paragraph (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

Learned counsel for the defendant has argued that given the proviso to s. 254(3) of the NLC, the plaintiff cannot treat as due and owing the amount secured under the charge as it covers not only an overdraft but also revolving credit. It is his argument that payment of the sums in the revolving credit portion is paid periodically. He has submitted that the revolving credit facilities given to the defendant was clearly for a periodic time for 3, 6 or 9 months and payment was due on these maturity dates. As a result, according to learned counsel by the words of the proviso, it is clear that paragraph (a) of s. 254(3) of NLC shall not apply to a charge to secure the payment of an annuity. Now, s. 242(1) of the NLC provides that every charge to secure the repayment of a debt, or the payment of any sum other than a debt, (in either case, whether the amount in question is to be paid as a lump or by instalments) shall be effected by an instrument in Form 16A. Looking at the facts of the present case, cl. 2.2(1) of the charge annexure in question defines indebtedness to mean the aggregate of the monies whether principal, interest, costs, charges outstanding or payable/agreed to be payable by the chargor/any security party from time to time and all liabilities and obligations whether present/future or actual/contingent for the repayment/payment of any monies by the chargor/ any security party in respect of/arising from the facility. The plaintiff's claim is for overdue amounts under the defendant's overdraft and revolving credit facilities. The overdraft is repayable upon demand whilst the revolving credit facilities are payable upon maturity date or, if rolled over, on demand. As set out in para. 2(h) on p. 3 of the letter of offer dated 13 March 1996, each I of the disbursement made under the revolving credit facility shall be repaid on the respective maturity date unless rolled over by the plaintiff, in which case, interests accruing are to be serviced. As I have stated earlier, the plaintiff had made the requisite demands for payments of the facilities. In consequence, to my mind the payments due under the revolving credit facilities are not periodic nor are they annuities. Both the overdraft and revolving facilities were recalled on 24 August 1999. For that reason, the entire sums granted under the facilities became immediately due and payable. In my judgment the defendant has failed to show how the recovery of both the overdraft and revolving credit facilities are precluded by the proviso to s. 254(3) of the NLC.

Turning to the second issue, the point taken by learned counsel for the defendant is that the notice in Form 16D contains serious discrepancies in amounts, interest rates, calculations and sums which were not due when compared with the prayers in the amended OS. He has argued that these discrepancies render the Form 16D a nullity. I am unable to agree with what has been argued by learned counsel. It is significant to bear in mind that the differences in Form 16D and the amended OS as pointed out by him arose out of the plaintiff's application to amend the OS. The learned judge had allowed the plaintiff's application and this decision has subsequently been affirmed by the Court of Appeal. Now, the defendant had never raised the issue of these differences in any of its affidavits in reply. It appears that the defendant's learned counsel only raised it for the first time on behalf of the defendant in his written submissions. I agree with the submission of learned counsel for the plaintiff that the plaintiff has been deprived of its rights to respond to such an averment had it been made by the defendant in its affidavit. To my mind this issue is an afterthought by the defendant and therefore, as submitted by learned counsel for the plaintiff and in my view he is correct in his submissions, the defendant is estopped from raising it now. I am also of the view that following the decision of the Federal Court in *Syarikat Kewangan Melayu Bhd v. Malayan Banking Berhad* [1984] 1 MLJ 115 the defendant has not been prejudiced or misled by the differences in the amount in the Form 16D and the amended OS for the following reasons. Firstly, it appears that the defendant refused to pay the outstanding sums owed to the plaintiff on the sole ground that it did not receive any reduction in the interest rate, which was allegedly promised by the plaintiff. Secondly, there is no evidence at all that the plaintiff had at any time tried to mislead or prejudice the defendant or that the defendant has been prejudiced or misled. Thirdly in this case there was no evidence that the defendant had ever sought information from the plaintiff how much was due from the charge so as to enable the defendant to make repayments. Even after the statutory demand of 4 October 1999 was issued, the defendant ignored it and refused to rectify the breach. Fourthly, the arguments of learned counsel for the defendant that the differences amount to a cause to the contrary is on shaky ground in the light of the Federal Court decision of *Co-operative Central Bank Ltd (In receivership) v. Feyen Development Sdn Bhd* [1997] 3 CLJ 365 where it was held that even if the chargor's allegation that the chargee had charged penalty interest were true, this would not amount to cause to the contrary within the meaning of s. 256(3) of the NLC.

I shall now deal with the third issue raised by learned counsel for the defendant. It is argued that the plaintiff is guilty of unconscionable conduct and has not shown that it is free from fault, as such the plaintiff therefore, is not entitled to obtain an order for sale. Learned counsel has argued that the reason there was non-payment by the defendant was due, to quote him, "to the plaintiff's unconscionable conduct in stringing the defendant along giving the impressions that it could obtain a deduction in interest rate". Now, it is important to bear in mind that an order for sale is an *ad rem* remedy and that this proceeding before me cannot be the forum for raising any contractual disagreement allegedly existing between the plaintiff and the defendant. This brings me again to the case of *Low Lee Lian (supra).* I think it is very useful to refer to what was said by Gopal Sri Ram JCA about this topic at p. 85G - 86B:

> Digressing for a moment, it is to be emphasized that here, as in other areas of our land law, it is important to distinguish between rights *ad rem* and rights *in personam*. That the Code expressly preserves this distinction was recognized by so learned a judge as Raja Azlan Shah J (as he then was) in *Mercantile Bank Ltd. v. The Official Assignee of the Property of How Han Tek* [1969] 2 MLJ 196 at p 198:
>
> > The Official Assignee's view is not correct; *Vallipuram*'s case (*Vallipuram Sivaguru v. Palaniappa Chetty* [1937] MLJ 59) is against him. He forgets that independent of our land legislation our courts have always recognized equitable and contractual interests in land. See *Loke Yew v. Port Swettenham Rubber Co* [1913] AC 491. See also s. 206(3) of the National Land Code.
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> In the present context, an action brought to set aside a charge upon one or more of the grounds of defeasibility specified under s. 340 of the Code is an action in rem. For when it succeeds, the consequence is to set at naught the chargee's rights under the registered charge as against the whole world. On the other hand, a chargor who is able to demonstrate that the chargee is under a personal obligation that binds his conscience not to enforce the charge, though not in a position to bring his case within one or more of the exceptions to the indefeasibility provision may nevertheless proceed to enforce that obligation against the chargee. This is an action *in personam*.

And further down at p 87 G-I, His Lordship said:

> As earlier observed, unless a chargor can bring himself within one of the three categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court will be obliged to make an order for sale. It would not be sufficient, as was done in the instant case, to allege mere breaches by the chargee of the loan agreement between the chargee and the borrower or even of the terms of the annexure to the charge in order to resist an application under

s. 256(3) of the Code. An allegation that the chargee acted in breach of contract, while it may give rise to an independent action *in personam*, is insufficient *per se* to defeat the *ad rem* rights of a chargee under his registered charge to an order for sale.

I am for that reason unable to agree with the submission of learned counsel for the defendant on the third issue. The issue raised by him does not constitute a cause to the contrary for purposes of s. 256(3) of the NLC. It may give rise to an action *in personam* and is in fact, the subject matter of the defendant's counterclaim against the plaintiff in the plaintiff's writ action in Civil Suit No.22-677-1999 in the Johor Bahru High Court.

The final issue raised by learned counsel for the defendant is that the amounts claimed as due and owing includes such matters as legal fees and valuation fees. According to him these items have been raised in the defendant's affidavit affirmed by Ow Eang Yeow on 30 March 2004 in encl. 63 and remain unrebutted. As I understand him, it is his submission that the plaintiff is not entitled to an order for sale because the outstanding amounts in the amended OS include legal and valuation fees. In this connection, I overruled the learned counsel for the plaintiff's objection to the admissibility of the defendant's affidavit in encl. 63. He has argued in his skeletal submissions dated 6 December 2004 that the defendant is out of time to file the said affidavit. To my mind the objection now taken is technical in nature which caused no prejudice whatsoever to the plaintiff or any miscarriage of justice. I would not allow technical objections unless the party taking the objection can show prejudice. Nonetheless, in my judgment learned counsel for the plaintiff is correct in his submissions that the plaintiff is entitled to an order for sale even though the amended OS include legal fees and valuation fees. Now, cls. 10.2 and 10.20(3) of the charge in question expressly permit the plaintiff to debit the defendant's account in respect of all monies due and payable under the charge including the plaintiff's solicitors' fees and any other fees and expenses incurred in recovering the said monies through any process of law. Clause 10.16 of the charge provides that the plaintiff shall as and when it deems fit be entitled to engage at the cost and expense of the defendant, a licensed valuer to carry out a valuation/revaluation of the charged property. In this context the authority that I would like to cite is the case of *Bangkok Bank Bhd v. Chuan Kee Co Sdn Bhd* [2000] 1 CLJ 766. There, Kamalanathan Ratnam J had this to say, and I respectfully agree with him, at p. 771 of the report:

Subsection (c) refers to 'the total amount due under the charge at the time of the sale'. To my mind, the words 'total amount' would indicate all sums that the plaintiff had to expend as at the time of the sale and this must necessarily include the legal fees.

Whilst the RHC has made provisions for costs to be taxed in respect of proceedings pursuant to an order of the court, it is now clear from the decision of the then Supreme Court in *Kandiah Peter v. Public Bank Bhd* [1994] 1 MLJ 119 that an order for sale when made under s. 256 of the NLC is not a judgment or a decree. Eusoff Chin SCJ (as his Lordship the Chief Justice then was) said at p. 123:

> In our judgment, where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought by the chargee under s. 256 of the Code, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither *res judicata* nor cause of action estoppel not issue estoppel are available answers to the chargee to meet the chargor's action.

Since pursuant to *Kandiah Peter* it is now clear that a chargee can proceed both under s. 256 of the NCL and by way of a suit and that the proceedings by way of s. 256 do not result in a judgment or decree but in making or refusing an order of sale, it is therefore conclusive that O. 59 r. 3(1) of the RHC has no place in proceedings under s. 256 of the NLC. It is therefore with respect, in the light of the recent decision in Kandiah Peter, that I decline to adopt the reasoning of Lim Beng Choon J in the *Chi Liung Holdings* case. The said legal expenses are therefore not expenses within the ambit of O. 59 r. 3(1) of the RHC since proceedings pursuant to section 256 of the NLC are not proceedings within the meaning of O. 59 r. 3(1) and also considering the fact that these expenses amounting to RM2,745 had been incurred long before the filing of the originating summons.

Moreover, in my judgment the defendant's argument that the plaintiff is not entitled to an order for sale for the reason that the outstanding amounts in the amended OS include legal and valuation fees, does not, in any event, constitute a cause to the contrary for purposes of s. 256(3) of the NLC.

In the present case, as I have set out earlier, the plaintiff had by a letter dated 24 August 1999 through its solicitor demanded of the defendant payment of the whole outstanding balances. The defendant failed and/ or neglected to pay the sums due, and accruing interest thereon or in part thereof within the periods specified and had thereby committed a breach of one of the terms of the charge. After that, the plaintiff through its solicitor then caused a statutory notice of default in Form 16D of the NLC dated 4 October 1999 to be issued demanding the outstanding amounts as at 31 August 1999 and requiring the defendant to remedy the said breach, failing which an order for sale would be applied. The defendant received the said notice but it failed and/or neglected to remedy the said breach. Furthermore, the plaintiff has filed all the relevant

affidavits under the provisions of O. 83 of the RHC. In my judgment the plaintiff has given all the appropriate statutory notices as stipulated in the NLC and complied with all the procedural requirements prescribed by O. 83 of the RHC. For the reasons given after having carefully considered all the circumstances of this case, it is my judgment that the defendant has failed to establish any valid ground that would constitute a cause to the contrary for purposes of s. 256(3) of the NLC. In the circumstances I would allow the plaintiff's application in encl. 58A with costs.